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# Barking dogs and building bridges

*A contribution to making sense of Hernando de Soto's ideas in the South African context*

## Introduction

Initially the intention of this chapter was to expose a highly inappropriate set of proposals for the South African context. Using Legal Entity Assessment Project (LEAP) and Development Works research and field experiences, the critique was going to be highly practical. However, things have not turned out quite that way. Instead, there is much greater ambiguity. Firstly, it seems from the commentary in the literature, that tackling this subject matter is more than a little out-of-date. Most of the secondary sources were written in immediate response to the publication of “The Mystery of Capital” in 2000, three or so years old.

This leads to the second and third points. What a flurry of irate responses there were to the publication of the Mystery of Capital! Others (for example, Fernandes, 2002) have noted that de Soto did a bad job (in fact no job at all) of recognising and acknowledging the work of hundreds of other individuals and organisations in the camp that recognises and promotes the action that people take to house themselves, to create their own shelter under very adverse circumstances. There can be little doubt that there is indeed a very rich tradition to draw on, which de Soto does not credit. However, de Soto has done a spectacular job of advocacy, the likes of which we seldom see in our camp of practitioners, researchers and academics who have committed months, years to understanding these processes, how they work and what can be done to improve the livelihoods and security of the people who make them work. He does this very cleverly. De Soto offers recognition

and he offers hope. He offers recognition for the extra legal practices that poor people live by to survive, and more. As one journalist points out; if de Soto's book is what it takes to get recognition that globalisation is not working for five-sixths of the world's population on to the US bestseller charts, then "more power to his elbow"! (Bunting, 2000). He also offers hope. He offers hope to national governments, and those that support them financially, that there is a simple mystery (unveiled by him) and a simple solution (proposed by him) about how to get capitalism to work for the poor, no less. As a consultant in the game of ideas (which means that even your best ideas are worth nothing unless someone wants to buy them), it's striking how spectacularly good this approach is! So in the words of one reviewer: "While economists call him simplistic, third world leaders just call him." (Miller; 2001). So that's the third point. Maybe we can all learn a lesson in advocacy.

Then there's another point about how uncomfortable it is to recognise so much of what de Soto describes as happening in the "extralegal" economy as apt, appropriate, well put etc and then to see him endorsed by the most conservative of icons. It's not hard to see why – he argues from within the status quo of capitalism and better still, he provides a solution to making it work for the poor. Searching on the internet and then following links from one site to another lead to cyber-places where angels should fear to tread! Our knees tend to jerk in response to what he, and others taking on his ideas, says because of this association. However, this is not particularly helpful. So this paper tries to overcome this tendency. This means starting within, and going back to, our - Leap's - rather more humble approach of exploring arrangements that secure tenure, access to services and livelihoods for the poor in diverse urban and rural contexts. And then looking to de Soto for what he has to say about our tenure concerns. This approach does not directly comment on whether de Soto offers a "third way", a solution to the problem of poverty! Instead its focus is on his argument about titling, which he argues will get us there.

Happily, the currency concern falls away because these ideas have found favour in recent investigations into township residential property markets and in "Breaking new ground", the new national housing plan. The objective of making residential property markets more functional relies heavily on de Soto's thesis of dead capital.

The title may need some explaining. There is this most striking thing about de Soto. His book, "The Mystery of Capital", has so captured the imagination of readers - detractors and supporters alike - that reviews, critiques, replies etc have taken his title and the essence of his idea and played with it. So you find titles and section headings like this: Demystifying de Soto, The Charms of Property, The Mystification of Legal Property, The Mystery of Credit. So appealing is this approach that this paper follows it too! A personal favourite is the article that asks "who let the dogs

out?”. There is a part in the book where he describes the barking dogs. He describes how he had no idea where the property boundaries were when he was strolling through rice fields somewhere in Bali. “Every time I crossed from one farm to another, a different dog barked. Those Indonesian dogs may have been ignorant of formal law, but they were positive about which assets their masters controlled” (de Soto, 2000:170-1). ). Reading this, it’s not hard to respond: but the people probably knew. Ask them! It’s not entirely fair to quote him out of context, especially when the point he is making is how to determine who owns what in the extralegal sector. Were AFRA fieldworkers listening to the dogs in Ekutheleni when they worked with the community to “demarcate” sites? They might have heard them. Maybe not. What IS certain, is that they were listening to the people and they were telling them exactly what they needed to know. And it was this: we know exactly where our land is, including commonage and public land. We can identify boundary disputes, disputes about the correct rights holder, and properties that have more than one household in occupation (Hornby, 2004). Regarding the bridge building part of the title – this paper’s fundamental concern is to interrogate de Soto’s notion of “bridge”.

### **A problem of selective listening**

While de Soto may have had his ears open to all the barking dogs in Bali, one of the biggest problem with the receipt of de Soto’s ideas in our own context may be one of selective listening. We all tend to hear what grabs us, but there is a very deal danger that his message of integration is lost in the simple attraction of making the extralegal legal, without doing terribly much about the legal system itself. This means, as a very minimum, understanding (describing) how the extralegal systems work in all their variety (and variety is seldom embraced by policy makers, though often by researchers!) and analysing why they work in the way they do. This question is not being asked very much.

In the *Mystery of Capital* he adds his voice to an already substantial conversation about the “extralegal sector”. His is a welcome addition, even if, maybe because, it’s rather loud and ostentatious. In our own context, evidence for disregard of the legal requirements of title dates as far back as the colonial era in South Africa. Kingwill (2004) records how in Grahamstown, in the British colony of the Cape of Good Hope, individual title holders tended to disregard various conditions pertaining to individual title, especially the legal requirement to transfer title through conveyancing and registration. The first survey for individual title was undertaken in 1852, there were subsequent grants in freehold in 1855 in rural areas and between 1855 and 1857 in urban areas in Grahamstown. This continued into the 1860’s and 1870’s. In 1894 the Glen Grey Act introduced strict conditions

against alienability without the prior consent of the Governor General and later with the second schedule of the Black Administration Act, 38 of 1927, this was extended to cover those titles which had been issued prior to the Glen Grey Act. Does this sound at all familiar? Back then, the intention behind this schedule of the Black Administration Act was to regulate alienation of all land owned in individual title by black owners, to minimise the prospect of individual titles reverting to informality or being easily alienated for debt. These trends were ongoing throughout the century in situations of quitrent and freehold. This mirrored the intentions of the initial regulation in the Glen Grey Act itself, which arose in response to the experience of a high incidence of mortgaging and sale in execution of debt (in that period particularly as a result of indebtedness to local white traders). This evidence raised two important points: alarm bells ring at the sale in execution aspect about the supposed benefits of using property as collateral for credit; and this experience also highlights the vicious cycle of extralegality or informality – formalisation – reversion.

What about now? In a study of what she calls alternative extra legal land markets in Folweni, presented at the land management symposium jointly hosted by Leap and the KZN Planning and Development Commission in September this year, von Riesen (2004) describes how well structured and functional it is. Folweni is a former homeland (R293) town on the south western side of eThekweni (Durban metro area). She describes how residents have constructed a land transaction system for themselves there because they held lesser forms of tenure and held land outside of the main market. One of the characteristics of this system identified by von Riesen is its adaptability. For example, the influence and status of the Traditional Authorities as the brokers in peri-urban land transactions has waned with the extension of local government to the area and elected local councillors have taken over this role. There is now a critical role in the brokering and validation of informal land sales. She reports that residents in Folweni would prefer to conduct their sales formally and in a legal fashion, if the current system will meet them half way. This is a similar point to that being made in Ekutheleni, except that the Ekutheleni experience (referred to below) shows that there does not seem to be a way currently of operationalising this need for a mid-point, or something inbetween.

Current research that Development Works is undertaking with Planact in Zandspruit and Zevenfontein in Johannesburg provides more evidence of what we know to be widespread in informal settlement environments - there are rules and regulations for the purchase and resale of land, for allocation and demarcation, and for recording. These are varied in nature and in their codification and enforcement. For example, in the Zandspruit public transit camp there has been an “official” process of registering residents operating alongside (superseded by?) another one, evidenced by the current mismatch between the register and what is on the

ground. Recordal, or evidence of rights, takes numerous forms including “green cards”, “A” and “B forms”, relocation letters and in the case of the formal extension to the transit camp, title deeds. In the private sites, where official recognition is less obvious, there seems to be considerably less coherence in the manner in which access is managed, tenure is less secure and people have “purchase receipts” as their only evidence of ownership. A market in land exists, although its extent is uncertain at this stage. In fact, this market has some characteristics of a futures market as informal sale seems to take place not only on the basis of sites but on the possibility of a site. Periodically it seems, the municipality provides stickers to indicate some form of official recognition and qualification. Somewhat bizarrely this has led to a market in stickers. Residents therefore describe (with not inconsiderable rancor) how some people have stickers on suitcases, as well as stickers on shacks. In Zevenfontein the stakes surrounding the registered list of residents is much higher, as it has created insiders and outsiders with immediate ramifications. “Approved beneficiaries” will go to Cosmo City – a long awaited mixed use and mixed income development in relative proximity to the current site is location on the informality scale. As a result, the community leadership governs access to the settlement in exchange for the certainty of relocation for those that are “qualifiers”. Maintenance of the register, and the process of sale and acquisition, has therefore become a community responsibility. In this case, the subsidy is the only game in town.

### **But can the bridge be built?**

So, the workings of the extra-legal sector are not news to us. Informal land management processes go back a long way in our own country and there is evidence of them in the here and now, as the previous examples of extralegal land transactions demonstrate. Of course, the obvious question that comes from this is, if it’s been going on since 1850, why is nobody listening? De Soto calls for recognition of the extralegal processes and the assets that the poor hold via representation and capitalization. We need much greater attention in our own country to describing these extralegal processes, in all their variety. This should be as much de Soto’s influence as his operational proposals for titling and his proposals for legal reform. This should be the starting point for any interventions to make residential property markets work for the poor.

In Leap we are finding that one of the most perplexing questions in this tenure work is: can the informal and the formal be bridged? We are debating whether or not this is possible or in fact desirable. De Soto’s graphic illustration of his central thesis is the image of a bridge from the extralegal and dead capital to the legal sector and living capital. So, once again, this prompts the question: but can this bridge be

built? It's a question that comes up again and again in reading his book, and it's a question that we in Leap, and others, have been asking, quite aside from de Soto. This seems to be the critical issue for land reform, for housing and for security of tenure. If de Soto's bold and breathless work helps focus the minds of decision makers on this critical question, then it may well be a good thing that they are reading him, provided of course that the message of integration is heard as well and the work attendant on that integration is understood.

Let's look for a moment at de Soto's version of this bridge building process, then at an experience in our own country. It's not that de Soto is silent on this question. Far from it. It's just that his solution is so simple: yes the bridge can be built, and here's the ABC (in fact, in this case the ABCD). Imagine for a moment building this bridge, only to find that the grass is not greener on the other side. The bridge takes you across the extralegal - legal divide, from the extralegal and its attendant problems, into the formal and in the process your capital comes to life! It's just that the formal is not all its cracked up to be. For one thing, it's hard to stay put. De Soto's argument would be, or is, that the bridge building process is actually a process of integration. Maybe his metaphor is a little faulty. It's not so much a question of getting from one side to the other, it's much more a matter of creating something new out of the imperfect status quo. Or is this a too sympathetic reading of him? It might be, if the bridge building metaphor is to hold. This is a serious question because he fundamentally accepts the status quo of capitalism, which he describes as the only game in town. And yet at the level of ideas, leaving operationalisation aside, not far beneath the surface of his simple answer is the not-so-simple idea of legal reform. It seems that it's this integration process that gets lost. He is calling for a legally integrated property system which entails fathoming a single system from the separate, loose extralegal property arrangements, in short "the people's law" or one all encompassing social contract. De Soto and his colleagues call this "the capitalisation process" and provide a formula to decode, discover and cost the extralegal arrangements, put in place the legal and political mechanisms for change and devise operational and commercial strategies for bringing capital to life. In short, a way of making capitalism work for the poor in developing countries.

De Soto's own evidence of what happened in the United States is clear demonstration about how long it takes to recognise the extralegal. Assuming for a moment that the bridge can be built (and political will is important here), then we need to be clear on what happens while it is being built as it may take a very long time. Quan (2003) makes the point that in the meantime the costs of formal property ownership and the debt burdens that are created when property is mortgaged, are not appropriate for the poor. So, until the bridge is built (assuming it can be), we need to be very much clearer about what should be done in the meantime. Here, although the answers are not too much of a mystery, the clues can

be found in more intermediate approaches to tenure and land administration – those that propose a mid way meeting point between two systems, rather than a bridge between one that is inaccessible and inappropriate and the other which may not offer enough opportunity or protection. Initial ownership may be one such example. And local land registers another. Were we to go down these roads, we may find the intermediate solutions to have a lot of staying power. This is not a minor point about nuance, but a rather more fundamental point about purpose, objectives and the implications of where policy attention and energy for legal reform are placed – using the bridge metaphor: the journey or the destination? In short, we may just find the answer to securing tenure in a manner that supports access to services and sustainable livelihoods somewhere on the bridge, rather than on the other side.

However, stepping out of the assumption that the bridge can be built and looking at the experience of Ekutheleni (Hornby, 2004), Leap and Afra found that there are no stepping stones, no ways for the poor to begin to enter the world of the economy and bureaucratic planning and service delivery, without also entering a property system that does not work for them. You are in or you are out. The experience is clear on this and years have been spent trying to build a bridge. For access to the economy and for access to services, the poor at Ekutheleni must give up a functional tenure security that works for most of them, in exchange for a property system that does not. “People are not asking for a replacement. They’re asking that what works for them be incorporated into official systems”. They want to be visible in the eyes of those who determine and allocate resources. The challenge coming from Leap’s engagement with Afra at Ekutheleni is to create something in the middle, moving towards visibility, so that people are neither in nor out, but somewhere inbetween, because that’s what will work for them.

### **And then what?**

This experience is not an isolated one. For example, there is growing evidence of how the poor in housing projects land up back in an informal system again. But let’s consider for another moment that de Soto’s bridge can be built, that the process of legal integration can and does happen. Then what? Let’s take one specific benefit central to de Soto’s argument – access to credit. Well, firstly, we all know that there are major problems for poor people with getting access to formal credit. There is substantial literature on this that is not quoted here. Instead, put that convincing argument aside just for another moment, suppose people do access formal credit or credit by another means, using their property as collateral. What a very risky proposition this was in Grahamstown way back in the 1850s! These days, in all this excitement about the prospect of capitalism working for the poor, we don’t hear

enough about the implications for the poor of property as a collateral base. The flip side of the great benefit of collateral is foreclosure. Where are the barking dogs now? Khuyasa Fund's anxiety is demonstrated in their concern that you can't compare a fridge and a property when it comes to foreclosure. Their credit model borrows heavily from existing practice in the furniture industry. And yet there's a problem with collateral base – the very thing that is being vaunted by de Soto and others. It's one thing to send your heavy weights to collect the fridge – this is acceptable practice - but quite another to foreclose on a house. But we know that property is the collateral base for the lenders who are brave enough to step over the red line. And we know what happens when people don't repay. Back in the fifties, the 1850s that is, we know from Kingwill (2004) that there was a high incidence of sale in execution for debt. This was a continuing phenomenon, so much so that the colonial government sought to protect their black colonial subjects by regulating resale. How different are things now? One place to go for evidence is the Social Housing Foundation report that Development Works did on social housing tenure options (Development Works, 2004). In that research we looked, among other things, at an example of a share-block scheme which happened to be a nature reserve bordering Kruger, which works very well for the point being made here. In discussion with one of its directors, the board's position on raising finance was striking. Under no circumstances were they prepared to use the property as collateral. It was simply too risky. Admittedly this is mostly a comment on the problem of putting the group at risk to a defaulting share-holder, but it also demonstrated how risky this notion of property as collateral for credit is perceived to be by a group of people with a very different income profile from those whom we are concerned about here.

Coming at his (and others) claim from another angle, there is other evidence that questions the pre-condition of formal title for access to credit, including from de Soto's Peru that compares households in areas with formal title with those without and finds in fact that those without formal title had greater access to credit (Calderon, 200?). In short, there are at least three reasons to question this claim: lenders don't lend to the poor; if they did, it's risky for the poor; and formal title appears not be a pre-condition for access to credit for the poor (where it happens). There seems to be a great deal more myth than mystery here.

But, continuing with the logic of the argument: title gives people entry to the formal market. Then what? Then de Soto's analysis comes back to haunt him. It seems that this is the greatest weakness. It is not enough. It is not sustainable and this is because there are other factors than lack of title that prevent capitalism from working for the poor, that prevented them from entering the market in the first place. Poverty is more complex than this, unfortunately. De Soto's analysis lacks the political-economic consideration of whose interests are served by maintaining the

status quo. This makes the prospect of legal reform, required for a system more appropriate, accessible and sustainable, highly unlikely. Its absence means that there is little recognition of power relations and political imperatives, without which the chances of imposed formalization – a seemingly simple and standardized solution - are exceedingly high. In addition, surely the point is at least as much about sustaining access as it is about gaining entry in the first place? What often happens in practice is that as soon as that formal system is applied to informal and communal areas especially, it breaks down (Leap, 2004). One issue at play here is that our service delivery, land administration and planning is fundamentally linked to the cadastre. Many of the land tenure functions are currently undertaken and best understood on land supported by the Deeds and the Cadastral system (“the formal system”). What happens when there is no cadastre or an inadequate cadastre or a cadastre that is unravelling? The land tenure functions don’t happen at all. Or, they happen in a haphazard, inappropriate or inequitable manner that might ride roughshod over people’s rights, allowing elites to capture control and create an impossible environment to service (ibid.).

So where are we? There seem to be a few options on the table.

- *Bringing capital to life*: This is de Soto’s approach including legal overhaul to create a property system based on what he calls “people’s law” as a means to bridging the extralegal – legal divide. This means that both systems are reformed to integrate the extralegal and the legal contracts, rules and procedures, to suit what people need from them.
- *Two worlds*: The formal system is ignored or disregarded by people in certain circumstances. The approach in this option is to recognize this reality but to accommodate the problems of invisibility by creating something intermediate. Tenure form and land registration may be places to start.
- *The bridge*: This is not de Soto’s version of the bridge, which is something of a faulty metaphor, as argued previously. Here the approach is to create the possibility of something less absolute and more appropriate to people’s needs. It’s about being in the middle and about moving towards visibility. This does not seem to be possible currently.

Is there a flaw in the formula for capitalization, for bringing capital to life, for making capital undead, if capital dies again? Surely the answer is yes, there is. Definately. The Finmark Trust research into township residential property markets found evidence from the metros of the informal resale of RDP houses and property in site and service areas (potentially 12 and 14% respectively) (Rust, 2004). In a scoping study for DFID, the USN and Development Works identify unregistered

owners as a growing phenomenon (USN and Development Works, 2003). Evidence from Cape Town (Robins, 2003) identifies a process of re-informalisation in Joe Slovo Park in Milnerton to describe the construction of backyard shacks and extensions to formal RDP houses. In the Planact research work in progress mentioned earlier, there is evidence of mismatch between the official register in the Zandpsruit transit camp and reality on the ground, indicative of informal resale.

These two points – about the risks associated with using property as collateral and the reality of reversion – take us back to the basics of sustainable tenure security. Unfortunately, there is no easy answer, no “one size fits all” solution. Reality IS complex. This is the policy challenge. This is the advocacy challenge. Simple IS seductive. But, the poor are not a homogenous group in possession of assets that can uniformly be described as dead capital. Land functions in various ways, which the notions of use and exchange value denote. This variety is helpfully conceptualized along the lines of Leap’s notion of a continuum (Ziqubu, 2002; Royston, 2004). In a more informal context land functions more as a livelihood asset while towards the other end of this conceptual continuum, land functions more as an economic asset for wealth accumulation in a more formal environment. The concept of dead capital has limited value in more informal contexts.

Neither is there a shared set of interests in formal title. And neither is it technically feasible. Years ago, we saw in Phola Park how advantageous informality or extralegality was to certain interest groups (Royston, 1998) and we saw something similar in Mannenberg (Robins, 2003). In Phola Park, at the height of ANC / Inkatha political conflict in Tokoza on the East Rand, Phola Park was an ideal place in which to hide and from which to engage in unlawful activities of various kinds, including gun trafficking. The prospect of formal title threatened the more vulnerable groups within these areas and conflict was the end result. The interests of circular South African migrants may be a secure place to live as cheaply as possible whilst in employment in the city, while foreign migrants may be interested in a relatively safe place to live to hide as “illegals” within the urban economy or in opportunities for participation in the informal economy or in refuge from poverty, drought or war in countries of origin (Royston, 2003). For poor households, interests may be in opportunities for informal activities in environments that are affordable by their very informality, while others may have the conventional and assumed interests in permanent urbanization, and the promise and expectations of formalization (ibid.). This complex reality of heterogeneous interests gets lost in de Soto’s glamorous claim to make capitalism work for the poor. Seduced by de Soto, there is a very real danger of forgetting that more humble notion of securing tenure, not as an end in itself, but as a means to development opportunities and sustainable livelihoods.

We have to do better than ask the inevitable question that this all begs – what matters more: market access, or sustainable tenure security? Are these two approaches so distinct that they cannot talk to one another's gravest concerns? We cannot afford for the discourse on these matters to get lost somewhere between the two camps of making markets work for the poor and a rights based and sustainable livelihoods approach.

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